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No. 92-194

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT L. TUCKER, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EXECUTIVE BRANCH RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the dismissal of petitioners' suit to compel a statistical adjustment to the 1990 decennial census.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Carey v. *Klutznick:*	
653 F.2d 732 (2d Cir. 1981), cert. denied, 455 U.S. 999 (1982)	3
637 F.2d 834 (2d Cir. 1980)	12
City of Detroit v. *Franklin*, No. 91-CV-73672-DT (E.D. Mich. Aug. 14, 1992), appeal pending, No. 92-2113 (6th Cir.)	12
Department of Commerce v. *Montana*, 112 S. Ct. 1415 (1992)	3, 10
Franklin v. *Massachusetts*, 112 S. Ct. 2767 (1992)	3, 4, 9, 10
Texas v. *Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992)	12
Webster v. *Doe*, 486 U.S. 592 (1988)	9
Young v. *Klutznick*, 652 F.2d 617 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982)	11

Constitution and statutes:

U.S. Const. Art. I, § 2, Cl. 3 (Apportionment Clause)	2, 10
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:	
5 U.S.C. 701(a)(1)	9
5 U.S.C. 701(a)(2)	9
5 U.S.C. 704	9

Statutes—Continued: Page

Census Act, 13 U.S.C. 1 *et seq.* 2, 9
13 U.S.C. 2 3
13 U.S.C. 141(a) 2, 9
13 U.S.C. 141(b) 2
13 U.S.C. 181-184 11
2 U.S.C. 2a 2, 4
2 U.S.C. 2a(a) 2, 4
2 U.S.C. 2a(b) 3, 4

Miscellaneous:

Bureau of the Census, United States Department of Commerce, Press Release, CB91-221 (June 13, 1991) 6
56 Fed. Reg. (1991):
p. 33,582 4
pp. 33,582-33,583 4
p. 33,584 5
p. 33,593 5
pp. 33,610-33,623 5
pp. 33,626-33,636 5
David A. Freedman, *Adjusting the 1990 Census*, 252 Science 1233 (1991) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37-77) is reported at 958 F.2d 1411. The district court's opinion (Pet. App. 1-36) is reported at 135 F.R.D. 175.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1992. A petition for rehearing was denied on April 29, 1992. Pet. App. 78-79. The petition for a writ of certiorari was filed on July 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I, § 2, Cl. 3 of the Constitution requires Congress to conduct a decennial census for the purpose of determining the number of representatives to which each State is entitled in the U.S. House of Representatives. That provision provides that the "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

The statutory implementation of this process appears in Title 13 and in 2 U.S.C. 2a. Pursuant to Title 13, the Secretary must complete and report to the President a "tabulation of total population by States" for the purpose of apportionment of congressional seats within nine months after the census date. 13 U.S.C. 141(b). The statute does not set forth detailed methodological requirements, but instead vests discretion in the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). After the census has been completed, and within a week after the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). Finally, within 15 days of the receipt of the statement, the Clerk of the House must "send to the

executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b). See generally *Department of Commerce* v. *Montana*, 112 S. Ct. 1415 (1992); *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992).

2. The "actual Enumeration" required by the Constitution always has been made through an actual count of individuals, rather than statistical estimations, even though there have been concerns about undercounts from the time of the first census in 1790. See *Carey* v. *Klutznick*, 653 F.2d 732, 735 (2d Cir. 1981), cert. denied, 455 U.S. 999 (1982). In connection with the 1980 and the 1990 censuses, the Census Bureau[1] has considered proposals to adjust the actual headcount statistically. Both the 1980 and 1990 censuses have spawned considerable litigation by States (and their localities and citizens) who have assumed that they would fare better under a statistical alteration.[2] In 1987, the Commerce Department decided that it would not make a statistical adjustment to the 1990 census headcount. In July 1989, however, the Department agreed to vacate this decision in a stipulation in an action brought by New York and other parties in the United States District Court for the Eastern District of New York. See *City of New York* v. *Department of Commerce*, 739 F. Supp. 761, 763 (E.D.N.Y. 1990). In the stipulation, the Department agreed to undertake de novo consideration of the adjustment question, and to issue a final decision no later than July 15, 1991. *Id.* at 769.

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[1] The Census Bureau is "an agency within, and under the jurisdiction of, the Department of Commerce." 13 U.S.C. 2.

[2] See *Carey* v. *Klutznick*, 653 F.2d at 735 n.10 (citing 36 cases in which States and municipalities sought adjustments to the 1980 census).

While this reconsideration took place, the Executive Branch complied with the statutory mandate of the Census Act; the census count was completed, and the President transmitted the census results to the Congress within the time limitations set forth in 2 U.S.C. 2a(a). As required by 2 U.S.C. 2a(b), the Clerk of the House has certified to each State the number of representatives to which it is entitled under those figures.[3]

On July 15, 1991, the Secretary determined that the census headcount should not be adjusted on the basis of a statistical methodology. 56 Fed. Reg. 33,582. The Secretary recognized the existence of undercounts in the census tabulation, but concluded that it was unclear that adjusting the headcount would improve the accuracy of the census and that adjustment might introduce new distortions as well as new fears of political manipulation. *Id.* at 33,582-33,583.

The Secretary explained that the Census Bureau had conducted an intensive investigation into an adjustment technique that relied primarily on a process known as dual system estimation. In this process, the Secretary conducted a post-census sample survey—the post-enumeration survey (PES)—of approximately 170,000 housing units in 12,000 blocks from across the nation, representing about one-sixth of one percent of the population of the United States.

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[3] Both Congress and the Clerk accepted the President's statement as validly triggering their obligations under 2 U.S.C. 2a, notwithstanding the proviso contained in the transmittal (inserted in compliance with the stipulation entered into in *City of New York*) that "The Department of Commerce is considering whether to correct these counts and will publish corrected counts, if any, not later than July 15, 1991." See *Franklin*, 112 S. Ct. at 2783 n.13 (Stevens, J., concurring in the judgment).

The blocks were selected to ensure that they included representatives of 1392 population subgroups known as "post strata," designed to reflect all of the various demographic components of the nation's population. The information gathered from the PES was compared with the information obtained during the census for those blocks. By comparing the data, an adjustment factor was developed for each post stratum that reflects the percent by which the PES indicated that the census overcounted or undercounted the population in that post stratum. An adjustment would have been accomplished by multiplying the number of people from each post stratum that the census located in each of the almost 5,000,000 blocks nationwide by the appropriate adjustment factor for that post stratum. See 56 Fed. Reg. at 33,626-33,636; see also David A. Freedman, *Adjusting the 1990 Census*, 252 Science 1233, 1234-1236 (1991) (providing a concise description of the process).

Opinions among career professionals at the Census Bureau, and among a panel of outside experts including some of the most highly regarded statisticians in the country, were sharply divided over the accuracy and efficacy of this method of adjustment. See, *e.g.*, 56 Fed. Reg. at 33,610-33,623 (recommendations of panel members). The Secretary determined that because the constitutional purpose of the census is to apportion seats in the House of Representatives, accuracy for adjustment purposes must be defined to mean "distributive accuracy—that is, getting most nearly correct the proportions of people in different areas," as opposed to an improvement in the accuracy of the total population count at the national level. *Id.* at 33,584; see *id.* at 33,593. Having considered advice both in favor of, and in opposition to, adjustment, the

Secretary concluded that there was no clear evidence that an adjustment would improve the distribution of the population and therefore that no adjustment should be made.

The administrative record provided considerable information regarding the effect the proposed adjustment would have on the census headcount. Applying these statistical assumptions, the Illinois population would have been adjusted upward from 11,430,602 to 11,592,000, but Illinois' percentage of the entire national population would have declined from 4.5960% to 4.5642%.[4] The adjustment would not have altered the number of congressional seats allotted to Illinois, although it would have resulted in seats being gained by California and Arizona, at the expense of seats being lost by Wisconsin and Pennsylvania. See Pet. App. 44.

3. Petitioners, eleven Illinois residents, filed this suit against the Department of Commerce, various Executive Branch officials, and the Clerk of the United States House of Representatives. Petitioners contended that the alleged undercount affected their political representation at the national, state, and local level and also would prevent them from receiving a proper share of funds and governmental services distributed under government programs on the basis of census population figures. See Pet. App. 3-4. Petitioners sought an order requiring the government to adjust the 1990 census to correct undercounts or overcounts in the population and to use the adjusted figures for all purposes for which decennial census data are used. *Id.* at 4. The district court dismissed petitioners' claims in their entirety (*id.* at

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[4] See Bureau of the Census, United States Department of Commerce, Press Release CB91-221, Table 5 (June 13, 1991).

1-36), based on its holding that the claims raised a nonjusticiable political question. *Id.* at 14-35. The court explained that the Constitution commits to Congress the authority to determine the manner in which a census shall be taken, *id.* at 30-32, and that it could discern no judicially manageable standards for determining whether an adjustment was proper, *id.* at 32-33. Finally, the court expressed concern about the imposition of inconsistent judgments regarding the propriety of adjustment. *Id.* at 34-35.

4. The court of appeals affirmed. Pet. App. 37-77. Although it rejected the district court's reliance on the political-question doctrine (*id.* at 54-56), it nevertheless concluded that petitioners had failed to establish a right to compel statistical adjustments designed to achieve a more accurate census. The court viewed the dispositive question as whether "the various provisions invoked by [petitioners] should be construed to authorize suits for judicial review of inaccurate census determinations," and concluded that "our answer is no." *Id.* at 64. The court noted that "[e]very methodological decision made in the government's statistical programs has a potentially adverse impact on some, perhaps many, persons," *ibid.*, and concluded that it would be inappropriate to allow all such persons to seek judicial review of such decisions, *id.* at 65-66.

The court also noted several other factors that influenced its decision, explaining that "[i]t might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a

judicially administrable standard." Pet. App. 66-67.[5] Similarly, the court observed that "[i]t would be otherwise if this suit were based on a concern with discrimination rather than with innocent inaccuracy," *id.* at 68. In sum, the court concluded, "[t]he dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical methodology is a case whose gears fail to mesh with any judicially enforceable federal rights." 958 F.2d 1411, 1419 (1992).[6]

Judge Ripple concurred in the judgment. Pet. App. 76-77. In Judge Ripple's view, the case should be dismissed for two reasons. First, petitioners' claims present nonjusticiable political questions to the extent they seek review of the apportionment of congressional seats. *Id.* at 76. Second, to the extent that petitioners seek an order requiring the Executive Branch to present a revised population count to Congress, "the plain language of the governing statute makes it clear that the matter is committed to agency discretion." *Id.* at 77.

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[5] On this point, the court noted that the relevant statutes are "[s]o nondirective * * * that it is arguable that there is no law for a court to apply in a case like this." Pet. App. 67-68. In light of the disposition of the case by the panel, the court had no occasion to consider whether the lack of law to apply posed an independent basis for dismissal of petitioners' claims. As noted below, Judge Ripple addressed that argument and concluded that petitioners' claims could have been dismissed on that basis.

[6] This portion of the court of appeals' opinion is quoted from the reported opinion because it does not appear accurately in the appendix to the petition.

ARGUMENT

1. This Court's decision last Term in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992)—decided three months after the court of appeals' decision in this case—makes it clear that the court of appeals correctly rejected petitioners' claims.

a. First, the Court held in *Massachusetts* that the Administrative Procedure Act (APA) does not provide for review of challenges to the manner in which the census was conducted, because the only "final agency action" under 5 U.S.C. 704 is the President's statement to Congress. 112 S. Ct. at 2773-2775. That statement is not susceptible to attack under the APA, because the President is not an "agency" under the APA. *Id.* at 2775-2776. Accordingly, because the APA is the only waiver of sovereign immunity that would permit petitioners' statutory claims to proceed, those claims must fail under *Massachusetts*.[7]

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[7] Because this Court concluded in *Massachusetts* that APA review was not available for the reasons explained in the text, it had no occasion to consider the government's arguments (see 91-1502 Gov't Br. 16-33) that review also was precluded by the language and structure of the Census Act, 13 U.S.C. 1 *et seq.*, and that agency determinations with regard to the census were committed to agency discretion by law. See 5 U.S.C. 701(a)(1) and (2). As we explained there, the Census Act sets out a comprehensive timetable for reporting the apportionment counts to the President, and in turn to Congress, which suggests that Congress did not contemplate judicial review and the attendant delays. Moreover, the statute otherwise vests discretion in the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). This unfettered grant of discretion strongly indicates that the matter is committed to agency discretion by law. See *Webster* v. *Doe*, 486 U.S. 592, 599-600 (1988).

b. *Massachusetts* mandates a similar result for petitioners' constitutional claims. As the Court explained in *Massachusetts*, a court evaluating a constitutional challenge to the census can only "review the dispute to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation." 112 S. Ct. at 2777; see *id.* at 2778 (a court should uphold a decision regarding census procedures if it is "consonant with, though not dictated by, the text and history of the Constitution"). Under this standard, petitioners' constitutional claims are meritless.

First, the practice challenged by petitioners is consistent with the constitutional language. The Apportionment Clause, Art. 1, § 2, Cl. 3, requires an "actual Enumeration * * * in such Manner as [Congress] shall by Law direct." It is implausible to suggest that this Clause requires the government to forgo reliance on the "actual Enumeration," and instead to rely on statistical estimates, especially in light of the consistent practice, for over two centuries, of relying on the actual headcount. Cf. *Massachusetts*, 112 S. Ct. at 2777 (noting importance of historical practice). Indeed, because the Constitution provides that the actual enumeration may be taken "in such Manner as [Congress] shall by Law direct," there can be no textual basis for setting aside any good-faith effort to conduct an "actual Enumeration." Cf. *Department of Commerce* v. *Montana*, 112 S. Ct. 1415, 1429 (1992) (considerable deference is due Congress's "apparently good-faith choice of a method of apportionment"). As the court of appeals observed, "merely by directing congressional apportionment in accordance with the decennial census Article I, Section 2, Clause 3 does not authorize lawsuits

founded on disagreement with the Census Bureau's statistical methodology." Pet. App. 70.

Second, the decision not to adjust does not undermine the goal of equal representation. The adjustment sought by petitioners would not affect the number of seats to which Illinois is entitled in the federal legislature. See Pet. App. 44. Also, the results of the census have no determinate effect on the allocation of those seats among the citizens of Illinois, or in the apportionment of local and state legislative bodies, because neither the Constitution nor any federal statute requires the use of census data for intrastate redistricting. See *Young* v. *Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982). Indeed, the Illinois legislature might have chosen to rely upon unadjusted figures even if the Secretary had determined that an adjustment was appropriate.[8]

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[8] Finally, *Massachusetts* makes clear that petitioners err in relying on the possibility that the failure to adjust the census will impair their access to federal funds; even if petitioners are deprived of certain federal funds because of errors in the census, they would not in any way have lost the "equal representation" that is the goal of the Court's apportionment decisions. Moreover, Congress is not required to allocate federal funds to states and localities on the basis of population. If Congress does elect to distribute funds on a population basis, it may use adjusted or unadjusted figures, as it chooses. In any event, the Census Bureau produces "intercensal" estimates of the population in each of the years between the decennial censuses, which are used in various programs that distribute federal funds based on population characteristics. 13 U.S.C. 181-184. Because the Census Bureau has not yet determined whether it will incorporate information regarding undercounts and overcounts gleaned from the PES into the base for intercensal population estimates, it is quite speculative to suggest that undercounts in the 1990 census will have any continuing effect on the allocation of funds under such programs.

2. Contrary to petitioners' suggestion (Pet. 27-28), the decision of the court of appeals does not conflict with the decisions of other circuits. The only court of appeals decision petitioners cite as in conflict, *Carey* v. *Klutznick*, 637 F.2d 834, 838-839 (2d Cir. 1980), was decided long before this Court's decisions in *Massachusetts* and *Montana*, which clarified the applicable principles. Although several other suits seeking to compel a statistical adjustment to the 1990 census have been filed in various federal district courts,[9] no court of appeals has addressed an adjustment claim in light of those decisions. Accordingly, the questions presented by petitioners do not merit review by the Court at this time.

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[9] See *City of Detroit* v. *Franklin*, No. 91-CV-73672-DT (E.D. Mich. Aug. 14, 1992) (granting summary judgment for the government), appeal pending, No. 92-2113 (6th Cir.) (notice of appeal filed Sept. 1, 1992); *Texas* v. *Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992) (denying motion to dismiss complaint of private parties and granting motion to dismiss complaint of State of Texas with leave to amend); *City of New York* v. *Department of Commerce*, No. 88-Civ-3474 (E.D.N.Y.) (awaiting decision after trial); *City of Toccoa* v. *Department of Commerce*, No. 2-91-CV-40 WCO (N.D. Ga.) (Gov't Mot. to Dis. denied Mar. 5, 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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